



Office of the Attorney General  
State of Texas

DAN MORALES  
ATTORNEY GENERAL

July 14, 1994

Ms. Leala Mann  
Associate General Counsel  
Texas Department of Transportation  
Dewitt C. Greer State Highway Building  
125 East 11th Street  
Austin, Texas 78701-2483

OR94-336

Dear Ms. Mann:

You ask whether certain information is subject to required public disclosure under the Texas Open Records Act, Government Code chapter 552. We assigned your request ID# 25640.

The Texas Department of Transportation (the "department") has received a request for information relating to, among other things, Tyson Blake Sparkman, now deceased. Specifically, the requestor seeks "copies of all documents and correspondence pertaining to my deceased son, Tyson Blake Sparkman, Southwest Insurance, Elizabeth Wilkerson, Stephen Thomas, or any employee of the Department of Transportation." You have submitted the requested information to us for review and claim that sections 552.102 and 552.103 of the Government Code except it from required public disclosure.

Section 552.102 excepts from required public disclosure "information in a personnel file, the disclosure of which would constitute a clearly unwarranted invasion of personal privacy." Section 552.102 protects information only if its release would cause an invasion of privacy under the test articulated for section 552.101 of the act by the Texas Supreme Court in *Industrial Foundation v. Texas Industrial Accident Board*, 540 S.W.2d 668, 685 (Tex. 1976), *cert. denied*, 430 U.S. 931 (1977). See *Hubert v. Harte-Hanks Tex. Newspapers*, 652 S.W.2d 546 (Tex. App.--Austin 1983, writ ref'd n.r.e.). Under the *Industrial Foundation* case, information may be withheld on common-law privacy grounds only if it is highly intimate or embarrassing and is of no legitimate concern to the public.

We have examined the information submitted to us for review. It relates to health insurance coverage that the requestor, a department employee, sought for his young son and a claim for insurance benefits the requestor made following the death of his son. The submitted documents include childcare billing statements, insurance company correspondence, departmental interoffice memoranda, and various other records and notes relating to Mr. Sparkman's efforts to insure his son's health and to collect on his son's insurance policy. In Open Records Decision No. 600 (1992) at 10, this office held that information about an employee's choice to participate in an optional insurance program that is funded by the employee and not the state is a "personal financial decision" that is protected by common-law privacy. *See also* Open Records Decision No. 545 (1990) at 4-5. In addition, the names of beneficiaries are intimate or embarrassing and of no legitimate concern to the public. Open Records Decision No. 600 at 11. Some of the requested information appears to involve a "personal financial decision" such as this office addressed in Open Records Decision Nos. 600 and 545 and is therefore protected by common-law privacy.<sup>1</sup> The remainder of the information, however, relates to the manner in which the department handled the requestor's request for insurance coverage and his claim for insurance benefits following the death of his son. This information is not intimate or embarrassing and is of legitimate concern to the public. Open Records Decision Nos. 470 (holding that the public has a legitimate interest in the job performance of public employees), 467 (same) (1987); *see also* Open Records Decision Nos. 444 (1986); 421 (1984); 405 (1983).

Our inquiry does not end here, however. Section 552.023 of the Government Code provides individuals with a limited special right of access to information about themselves. It states in pertinent part:

(a) A person or a person's authorized representative has a special right of access, beyond the right of the general public, to records and copies of records held by a governmental body that contain information relating to the person that is protected from public disclosure by laws intended to protect that person's privacy interests.

(b) A governmental body may not deny access to information to the person, or the person's representative, to whom the information relates on the grounds that the information is considered confidential by privacy principles under this chapter but may assert as grounds for denial of access other provisions of this chapter or other law that are not intended to protect the person's privacy interests.

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<sup>1</sup>In addition, some of the requested information concerns the medical condition of the requestor's son and is also intimate and embarrassing and of no legitimate concern to the public. *See, e.g.,* Attorney General Opinions JM-229 (1984); JM-81 (1983); Open Records Decision No. 370 (1983). Such information, however, may not be withheld on common-law privacy grounds, because in Texas deceased persons have no common-law privacy interests. *See* Open Records Decision No. 432 (1985).

Section 552.023, subsections (a) and (b), prevent a governmental body from asserting an individual's own privacy as a reason for withholding records from the individual. *See* Open Records Decision No. 481 (1987) (determining that common-law privacy does not provide a basis for withholding information from its subject). In addition, a governmental body may not withhold under section 552.102 of the Government Code information from an employee on the ground that disclosing it would constitute "a clearly unwarranted invasion" of the employee's privacy. Open Records Decision No. 288 (1981) at 3.<sup>2</sup> The information that we conclude is private relates only to the requestor. Accordingly, the department may not withhold the requested information under section 552.102 of the Government Code.

Next, we address your assertion that section 552.103(a) excepts some of the requested information from required public disclosure. Section 552.103(a) excepts from required public disclosure information:

(1) relating to litigation of a civil or criminal nature or settlement negotiations, to which the state or a political subdivision is or may be a party or to which an officer or employee of the state or a political subdivision, as a consequence of the person's office or employment, is or may be a party; and

(2) that the attorney general or the attorney of the political subdivision has determined should be withheld from public inspection.

Information is excepted from public disclosure by section 552.103(a) if litigation is pending or reasonably anticipated and the information relates to that litigation. *Heard v. Houston Post Co.*, 684 S.W.2d 210 (Tex. App.--Houston [1st Dist.] 1984, writ ref'd n.r.e.). Although section 552.103(a) gives the attorney for a governmental body discretion to determine whether section 552.103(a) should be claimed, that determination is subject to review by the attorney general. Open Records Decision Nos. 551 (1990) at 5; 511 (1988) at 3. Whether litigation may be anticipated must be determined on a case-by-case basis. Open Records Decision No. 452 (1986).

You claim that the department may reasonably anticipate litigation because the requestor retained an attorney in 1990 and verbally threatened the department with litigation on one occasion in 1994. This office has concluded that a reasonable likelihood of litigation exists when an attorney makes a written demand for disputed payments and


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<sup>2</sup>The right of access to private information about one's self that section 552.023 gives an individual does not override exceptions to disclosure in the Open Records Act or confidentiality laws protecting some interest other than that individual's privacy. *See* Open Records Decision No. 556 (1990) at 2.

promises further legal action if they are not forthcoming, Open Records Decision No. 551, and when a requestor hires an attorney who then asserts an intent to sue, Open Records Decision No. 555 (1990). On the other hand, the mere fact that a requestor publicly states on more than one occasion an intent to sue does not trigger section 552.103(a). Open Records Decision No. 452. Moreover, an isolated threat of litigation, without more, is not sufficient to show the likelihood of litigation. *Id.* You have provided us with no information that indicates that the requestor has done more than retain an attorney four years ago and threaten the department with litigation on a single occasion recently. Accordingly, we conclude that in this instance litigation is not reasonably anticipated and that the department may not withhold the requested information under section 552.103(a) of the Government Code. The department must therefore release the requested information in its entirety.

Because case law and prior published open records decisions resolve your request, we are resolving this matter with this informal letter ruling rather than with a published open records decision. If you have questions about this ruling, please contact this office.

Yours very truly,



Margaret A. Roll  
Assistant Attorney General  
Open Government Section

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Enclosures: Submitted documents

Ref.: ID# 25640

cc: Mr. and Mrs. Terry Sparkman  
Route 3, Box 129B  
Terrell, Texas 75160  
(w/o enclosures)

Honorable Keith W. Oakley  
Chairman, Public Safety Committee  
Texas House of Representatives  
P.O. Box 2910  
Austin, Texas 78768-2910  
(w/o enclosures)